Petition

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No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

ROBERT R. WHELAN,
PETITIONER,

v.

LARRY W. ROBBINS AND
GARY M. BAIRD,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether a report compiled by the United States Department of Transportation from information supplied to it by private corporations falls within the exception to the hearsay rule prescribed by Federal Rules of Evidence, Rule 803(8).

2. Whether the failure of respondents' counsel to state precisely the purpose for which he offered evidence alleviates error by the trial judge in excluding the evidence for lack of relevance.

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RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner Robert R. Whelan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 7, 1981.

Opinions Below.

The opinion of the divided Court of Appeals, reported at 653 F.2d 47 (1981), appears in the Appendix hereto (App. 1a-12a). An earlier opinion of the Court of Appeals, which was withdrawn by the Court in response to a petition for rehearing filed by the respondent Robert R. Whelan, was unreported and appears in the Appendix hereto (App. 18a-24a). The Memorandum and Order of the Court of Appeals granting the petition for rehearing, which was unreported, appears in the Appendix hereto (App. 26a-27a). No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on July 7, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Federal Rules Involved.

FEDERAL RULES OF EVIDENCE.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . . . .

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

. . . . . .

Statement of the Case.

This negligence action arises out of a collision between two automobiles that took place in Bourne, Massachusetts, on September 2, 1971. The case was commenced in January, 1974, in the United States District Court for the District of Massachusetts. The jurisdiction of the court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiffs all being residents and citizens of Massachusetts, the defendant being a resident and citizen of New Jersey, and the amount in controversy exceeding $10,000.00.

Pursuant to an order of the court, the trial of the liability and damage portions of the case were bifurcated. After six days of trial on the liability aspects the jury, having deliberated one hour, returned a verdict for the defendant/petitioner Robert R. Whelan. Judgment was entered by the court on the verdict (App. 16a).

Both plaintiffs/respondents appealed the judgment to the United States Court of Appeals for the First Circuit. Preliminarily the Court of Appeals ordered that no oral argument

would be heard on the case (App. 17a). On December 30, 1980, the court issued its decision, vacating the judgment and remanding the case to the District Court for a new trial (App. 25a). In an accompanying opinion the court indicated that the decision was based on its conclusion that the trial court had wrongfully excluded from evidence a government report proffered by the plaintiffs/respondents which was entitled "Performance Data for New 1971 Passenger Cars and Motorcycles" (App. 18a-24a).

The petitioner then filed a petition for rehearing which the Court of Appeals granted (App. 26a-27a). The court vacated its December 30, 1980, order and withdrew the opinion (App. 26a-27a). On July 7, 1981, the court, divided 2-1, issued its second decision and opinion, again vacating the judgment and remanding the case for a new trial because of the exclusion of the government report (App. 28a, 1a-9a). Judge Levin Campbell dissented. He concluded that the plaintiffs had failed to properly inform the trial judge of the purpose for which the excluded report was offered. Judge Campbell further stated that even if the exclusion of the report was error, that error was harmless because the report was merely cumulative to other evidence (App. 10a-12a).

The evidence was as follows. On the evening of September 2, 1971, petitioner Robert R. Whelan, an attorney in New Jersey, and his wife were travelling from New Jersey to Barnstable, Massachusetts. They left New Jersey at about 4:00 P.M. Shortly before 11:00 P.M., the Whelan car was in Bourne travelling along Route 6 with Mr. Whelan driving.

At the same time and place there was an automobile owned by respondent Baird in which he and respondent Robbins, both 17 years old at the time, were passengers. The Baird car was driven by a Curtis Frye, 18 years old, not a party to this case. During that day the three boys had been drinking beer. Sergeant Embrescia of the Bourne Police Department, the of-

ficer who investigated the accident, testified that Frye had told him after the accident that he — Frye — had had six cans of malt liquor that day.

Just prior to the accident the boys drove to a scenic rest area adjacent to Route 6 in Bourne, where they parked. Route 6 in Bourne is a four-lane, undivided highway with two lanes in each direction. It runs approximately east and west paralleling the Cape Cod Canal. The rest area where the Baird car was parked was on the southerly side of the highway, or to the right of cars travelling east as was Whelan's. The rest area was approximately 58 feet wide. It abutted the highway, with no curb or divider separating it from the road. The only demarcation between it and the highway was a painted white line.

The circumstances of the collision between the respondents' and the petitioner's automobiles were in sharp dispute. Whelan testified that he was driving east in the right or travel lane of the two eastbound lanes of Route 6 as he approached the rest area. He was travelling at approximately 45 to 50 miles per hour in a 50 miles per hour zone. He first saw the respondents' car when he was 750 to 900 feet away from it. The Baird car was well within the rest area, travelling in a course parallel to petitioner's but in the opposite direction. Since respondents' car was well off the road, Whelan saw no danger from it and did not alter his speed or course.

When the petitioner's car was only approximately 70 feet away, respondents' car suddenly swerved out from the rest area into the highway in front of petitioner's vehicle. Whelan applied his brakes and began to turn to the left into the passing lane in an attempt to avoid the Baird car. The right front portions of each car collided, the point of collision being approximately in the middle of the eastbound travel lane.

Neither respondent had any memory of the accident or its circumstances. The only eyewitness testimony presented by respondents was that of driver Frye, who admitted that for at

least five months after the accident happened he had no recollection of it, but that after this his memory slowly returned. Frye testified that he had parked the car in the rest area with its headlights facing the highway. When he decided to leave the area, he drove to the edge of the highway and stopped, first looking to his left and then to his right. On his first look to the left he saw petitioner's car about 700 feet away and approaching. Frye began to move, intending to cross the eastbound lane and turn left into the westbound lane. As he pulled into the highway he looked to his left a second time and saw the petitioner's car now 300 feet away, and travelling at what he thought to be over 70 miles per hour. He testified that he then decided that he could not make it completely across the road without being hit by the oncoming car, so he turned back to his left toward the rest area. He said that he was in the rest area when his car was struck by petitioner's vehicle.

The Bourne Police Department investigated the accident. The Bourne officer's investigation indicated that the point of impact of the collision was not in the rest area but, as Whelan had stated, in the center of the eastbound travel lane of the highway. A Massachusetts State Police Trooper also testified, claiming that he had gone to the accident scene shortly after the collision but, notwithstanding the accident's seriousness, had made no notes of his investigation, made no written report, and did not orally tell anyone of his conclusions for eight years. Without any means of refreshing his memory the trooper testified, in contrast to the Bourne officer, that skid marks that could be seen on the highway were fresh, that they were left by the Whelan car, and that they measured 160 feet in length. The trooper further stated that the point of impact was inside the rest area rather than on the highway, and that, based on his observation of the skid marks, his opinion was that the petitioner's vehicle was travelling in excess of 50 miles per hour at the time of the accident.

Petitioner Whelan called one witness, a mechanical engineer qualified as an expert in accident reconstruction. Based on an analysis of the weights of the two cars and their final resting places, the expert concluded that at the moment of impact the Baird car was travelling at a faster rate of speed than was that of the petitioner, and that the point of impact between the two cars was within the eastbound travel lane, slightly to the right or south of the interrupted line that separated the eastbound passing lane from the eastbound travel lane. The expert also stated that the skid marks identified by the trooper as having been made by the Whelan car were not in fact made by that car or by any car, but rather by a lightly loaded truck.

Just before resting, plaintiffs offered as evidence a manual entitled "Performance Data for New 1971 Passenger Cars and Motorcycles" compiled by the United States Department of Transportation. The report contained information on the maximum stopping distances for all automobiles manufactured in 1971, which included petitioner's vehicle (App. 2a). The report was published pursuant to the mandate of 15 U.S.C. §§ 1381-1431 and 49 C.F.R. § 575, Subpart B. The information contained in the report was furnished by the automobile manufacturers to the National Highway Safety Bureau, which compiled the data into the report (App. 5a).

The report was excluded by the trial judge. In the midst of the colloquy between the judge and counsel concerning the report's admissibility (the colloquy is reproduced in its entirety at App. 29a-32a), the judge asked respondents' counsel for what purpose the report was offered. The response was the following:

> THE COURT: For what purpose?
>
> MR. MACDONALD [Counsel for respondent Robbins]: For the purpose of the information contained therein

relative to the case that's here, the performance standards of motor vehicles and this is what I'm offering this for. The passenger cars and motorcycles, performance date [*sic*] for the year 1971 relating to the stopping capacity of an ability of a 1971 Mercedes 280SE.

THE COURT: Do you have a copy of the statute?

MR. MACDONALD: I can get one.

MR. MARTIN [Counsel for respondent Baird]: I think I have a book.

THE COURT: 233 79(b). I have a little trouble, Mr. MacDonald, seeing how some standard is relevant in this case when we're dealing with a particular automobile that may or may not conform to the standard.

Unless you show me that its failure to conform is some form of negligence, I haven't heard anything on that.

MR. MACDONALD: It is offered for the purpose of showing what, under standard tests conducted by the federal government, what the manufacturers according to their standards, this vehicle was stopped at a distance of 160 feet, traveling within a marked lane 12 feet wide, without leaving tire marks, with a light load in it. And I think that it is important.

THE COURT: There's evidence there that he didn't put on his brake here until —

MR. MACDONALD: Seventy feet away.

THE COURT: You are talking about 160 feet.

MR. MACDONALD: 160.

THE COURT: No. 2 —

MR. MACDONALD: The stopping ability of the vehicle.

THE COURT: That is the relevance of that. Nobody says that the vehicle was unable to stop. It is a question of when he put on his brakes, whether it was reasonable for him to put on the brake or unreasonable for him to

put on the brake at that particular point; that's the issue in the case. Or one of the issues in the case. Not whether this kind of car would stop at 160 or 190 feet. There's no evidence that he started to put on his brake sooner.

I think I will rule it out simply on the question, I don't see the relevance of the standard car to this particular case and this particular accident, and I'll save your rights.

MR. MACDONALD: May I make an offer of proof?

THE COURT: But the evidence as I have seen it so far is nothing to do with what is in this book and what this book contains and what you tell me it does not add anything to the evidence.

MR. MACDONALD: I offer this exhibit into evidence for the reason that it contains performance data for new 1971 passenger cars, Mercedes-Benz 280SE, which is a vehicle that's one of the vehicles involved in this case, and it's offered for the purpose of showing what the stopping ability of a 280SE with a light load or with a heavy load in it. And that the distance traveling within a 12-foot lane that it would stop in 160 feet and with a light load and 169 feet with a heavy load.

Reasons for Granting the Writ.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 803(8) OF THE FEDERAL RULES OF EVIDENCE.

Rule 803(8) of the Federal Rules of Evidence excepts from the hearsay rule:

> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public

> offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The First Circuit here held that this provision, specifically Rule 803(8)(c), applied to a report compiled by a government office which contained information that was supplied in full to that office by private sources (App. 4a-8a). The court concluded that the rule did not require that the reporting public officials have personal knowledge of the facts reported, but merely that they personally know of the investigation by which said facts were accumulated (App. 8a). In so holding the First Circuit has departed from the policy set out in the Advisory Committee's Notes to Rule 803, which state in part: "[i]n a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge." More importantly, the First Circuit's dispensing with the personal knowledge requirement under Rule 803(8) conflicts with holdings of the Second, Third, Fifth, and Sixth Circuits.

The Second Circuit specifically rejected the position taken by the First Circuit here in the case of *United States* v. *Corr*, 543 F.2d 1042 (2d Cir. 1976). In the *Corr* case the defendant argued that the trial court had erred by excluding from the evidence an SEC release that reported the results of an investigation that that agency had performed. *Id.* at 1050-51. The

court rejected this position. *Id.* at 1051. It held that "the document was hearsay outside of the hearsay exception of Rule 803(8)(c) of the Federal Rules of Evidence since the release was not a determination of facts obtained after administrative proceedings." *Id.* The SEC here clearly had knowledge of the fact of the investigation which it had itself conducted; therefore under the First Circuit's rule the release would have fallen within the Rule 803(8)(c) exception. Since the SEC was without specific personal knowledge of the facts accumulated through the investigation, however, the Second Circuit held that the hearsay exception of Rule 803(8)(c) did not apply to a report of those facts. *See id.*

The Sixth Circuit adopted a similar position in *United States v. 478.34 Acres of Land, Tract No. 400*, 578 F.2d 156 (6th Cir. 1978). In this land damage case, the trial court admitted over objection a statistical survey prepared by the government which contained selling prices of land obtained by a government employee from recorded deeds located in the county courthouse. *Id.* at 157-158. The Sixth Circuit reversed, holding, *inter alia*, that this report did not fall within the Rule 803(8) exception and that its admission was reversible error. *Id.* at 159. Noting indirectly the lack of any firsthand knowledge of the selling prices on the part of the report's preparer, the court stated that "[t]here was no way for the landowner to test the accuracy or reliability of the data." *Id.*

The First Circuit's interpretation of Rule 803(8) also conflicts with holdings of the Fifth and Third Circuits. In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), the Fifth Circuit, while upholding the admission of so much of a Coast Guard report as contained the agency's own factual findings, declared that the lower court erred in admitting that portion of the report that contained a quote from an outside source, the *Encyclopedia of Chemical Technology*. *Id.* at 222. This quote, the court stated, was double hearsay. *Id.* This situa-

tion is fully analogous to that in this case where the second level of hearsay, the statements by the vehicle manufacturers regarding characteristics of their vehicles, is repeated in the government report without independent investigation of those statements by the reporting agency. This double hearsay test was also cited by the Third Circuit in its approval of the exclusion of portions of a National Transportation Safety Board report in *John McShain, Inc.* v. *Cessna Aircraft Co.*, 563 F.2d 632 (3rd Cir. 1977). Making reference to the Advisory Committee's Notes on the Federal Rules of Evidence, the court held that Rule 803(8) applied solely to statements of officials in reports; statements of non-officials, even though contained in the report, were inadmissible as hearsay evidence. *Id.* at 636.

In addition to the conflict between the ruling of the court below and holdings in other circuits, certiorari should be granted here because of the importance of the question raised to the administration of justice in the trial courts. In this day of ever-increasing size at all levels of government, public offices and agencies are producing reports on a wide range of issues. Many of these reports are certain to contain information useful to one litigant or another in District Court proceedings. As the law presently stands, however, significant uncertainty exists on the extent to which such reports are admissible in evidence. In order to remove this uncertainty and thereby prevent the unnecessary retrials that will result when a District Court interprets Rule 803(8) in a fashion later held to be incorrect by a Court of Appeals, the Supreme Court should grant certiorari and settle this important question.

These conflicts, and the importance of the issue, justify the grant of certiorari to review the judgment below.

II. The Decision Below Raises a Significant Issue Concerning the Efficient Administration of Justice in the Trial Courts.

As the dissent by Campbell, J., specifically indicates (App. 10a-11a), and the majority opinion suggests (App. 2a n.1), the respondents did not advise the trial judge below of the purpose for which the excluded Department of Transportation report was being offered. The majority opinion states that "read in retrospect" the colloquy between respondents' counsel and the court over the report "reveals that (respondent) was referring, none too succinctly, to" the purpose for which the report would have been relevant (App. 2a n.1). Because of respondents' failure of articulation the trial judge never fully understood the reason for which the evidence was offered (App. 10a); she therefore excluded the report on relevance grounds, never reaching the hearsay issue (App. 10a).

The majority below has, therefore, by vacating the judgment and ordering a new trial, relieved the respondents of the consequences of their failure to fulfill their clear duty to specifically articulate to the trial judge the purpose for which they proffered the government report. *See* Fed.R.Civ.P. 46; *St. Joe Paper Co.* v. *United States*, 155 F.2d 93, 97-98 (5th Cir. 1946). The consequences of this holding extend beyond this case to all cases tried to a jury. The efficient administration of justice requires that, to the extent possible and consistent with litigants' rights, each case be tried but once. To ensure this, a trial judge must be entitled to rely on counsel to fully and succinctly point out the grounds for admission of evidence that is proffered. If, as the court below holds, the full and succinct articulation of this purpose may be left to the appeal of the case, error by the trial court is invited and new trials will result. This position was stated forcefully by Circuit Judge Levin Campbell in his dissenting opinion below:

> Before a party may claim error on appeal in the exclusion of evidence, he must have told the court not only what he intended to prove but *for what purpose*. [Citations omitted.] This rule serves important ends. Backlogged courts should not be required to repeat trials (especially civil trials) because the trial judge has excluded evidence for lack of a clear understanding of the proponent's purpose in offering it. Here, plaintiffs' counsel never explained, as he could easily have done, that his purpose was not to show stopping distance at 60 m.p.h. as such, but rather to give rise to the inference, based on a disputed skid mark, that the car was speeding. It seems clear from the judge's remarks that she did not understand that the evidence was being offered for the latter purpose. The document was thereupon excluded for lack of relevance (the hearsay issue was never reached). All this occurred at the end of a week long trial, in a context where the judge could reasonably have felt that matters were being unduly prolonged.
>
> The reason a party must communicate the purpose for offering evidence is to put the trial judge on notice while there is still time to save the situation. A trial judge is only human; he may not have perfect recall of earlier testimony; it is counsel's duty, not the court's, to articulate the purpose for which evidence is being offered. Nowhere in this record did counsel say something like, "Judge, I am offering this because we earlier had evidence of 160 foot skid marks and this exhibit will show that if it took the car 160 feet to stop, it must have been going faster than 60 m.p.h." Had this been stated, a different ruling might have been rendered. [Emphasis in original.]

(App. 10a-11a).

In this case alone, the retrial will cost the United States District Court at least five trial days on the liability aspect of the case, plus an undetermined amount of additional time to try the damage issues. Such a waste of judicial resources as a result of the failure of respondents' counsel to fully inform the trial judge should not be countenanced by this Court.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Appendix.

United States Court of Appeals
For the First Circuit

No. 79-1647

LARRY W. ROBBINS, ET AL.,

PLAINTIFFS, APPELLANTS,

v.

ROBERT W. WHELAN,

DEFENDANT, APPELLEE.

ON PETITION FOR REHEARING

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Robert W. MacDonald on brief for appellants.
Thomas D. Burns, James F. Kavanaugh, Jr., and *Burns & Levinson* on brief for appellee.

July 7, 1981

COFFIN, *Chief Judge*. After rehearing and the submission of briefs we withdraw our first opinion and issue the following decision.

This appeal stems from an automobile accident involving a 1971 Mercedes car driven by the defendant-appellee, Robert Whelan, and a second car in which the two plaintiffs-appellants were passengers. The driver of the second car, Curtis Frye, is not a party to this suit. The accident took place as the Mercedes was traveling east on a four lane undivided highway and the Frye car was exiting a rest area, abutting the southern edge of that same highway. The plaintiffs assert that the Mercedes was first noticed some 700 feet away at the time

Frye first approached the highway. Before entering the highway Frye looked in both directions. Upon entering he again looked in the direction of the Mercedes, and this time noticed that it was only 300 feet away and approaching at a speed of about 70 miles per hour. At this point Frye attempted to reenter the rest area. As the resulting collision attests, he was unsuccessful.

The defendant's version claims that he was traveling at about 40 to 48 miles per hour when the Frye car was first noticed some 750-900 feet away advancing in the rest area in the opposite direction. The defendant says he maintained his speed up to a point where the Frye car entered the highway in a "sudden swerve" which left little time for any reaction. After a bifurcated trial the jury decided the issue of liability in favor of the defendant.

Appellants' first claim of error is that the trial court should have admitted into evidence a copy of a Department of Transportation National Highway Safety Bureau report entitled "Performance Data for New 1971 Passenger Cars and Motorcycles." This report contains information on the maximum stopping distances for all automobiles manufactured in a certain year. Specifically, the plaintiffs sought to introduce into evidence that part of these tables stating that the particular type of automobile driven by the defendant had, when traveling at a speed of 60 miles per hour, a maximum stopping distance of 160 feet with a light load and 169 feet with a heavy load. The defendant objected to this document on the grounds that it was not relevant. The district court agreed.

We think the evidence was relevant.[1] A Massachusetts State Police Trooper previously had testified that the defendant's car, which he thought had been traveling faster than 50 miles

[1] We pause to note an anomaly that not infrequently attends the review of trials—the extensive discussion in the appellate court opinion directed to an incident at trial that received only fleeting attention. Here, for example, appellant called an official of the Registry of Motor Vehicles to testify regarding information from the National Highway Safety Bureau report. Defendant immediately objected that "because there is some agency in Washington that compiles a book of information with respect to various cars and what they

per hour, had left 160 feet of skid marks. The braking performance report stated that new cars of the defendant's model required at most 169 feet to stop under the test conditions of 60 miles per hour. If factors other than speed were common to both the test and the accident, the report would have supported an inference that the defendant—who presumably was trying to stop as fast as possible—was in fact driving faster than his claimed 40 to 48 miles per hour.

The factors other than speed prevailing both during the test and at the accident were sufficiently similar to allow the jury to hear this evidence. In general, because "perfect identity between experimental or actual conditions is neither attainable nor required. . .[,] [d]issimilarities affect the weight of the evidence, not admissibility." *Ramseyer* v. *General Motors Corporation*, 417 F.2d 859, 864 (8th Cir. 1969) (citations omitted).[2] Each case must be judged under its own particular facts taking into account the specific purposes for which this type of evidence is submitted.[3] In this particular

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might do or will not do under the circumstances, I don't think that has any relevancy, materiality or admissibility in this case."

When read in retrospect, the subsequent colloquy reveals that appellant was referring, none too succinctly, to use of the report as an indirect means of calculating the Mercedes' speed prior to braking. It appears that the court was considering only the relevance of the report as bearing on inadequate brakes, a factor that was not in issue. Nevertheless, we cannot say that the record is so confused that the point as to relevance was not sufficiently made. That point being preserved, we cannot avoid the analysis that follows.

[2] *Cf. Winekoff* v. *Popiel*, 384 Mich. 260, 181 N.W.2d 897, 898 (1970) ("our steady experience with automobile negligence cases suggests that these widely published and pretty well understood stopping distances have some value as evidence, provided the proof preceding their admission discloses a fair and relevant reason for submitting them to the jury as an aid to the solution of the ever-present issues of due care and causation").

[3] The fact that the detailed conditions under which the tests for individual models were performed may be easily verified helps distinguish the report in this case from those in which the opaque averaging of generalized results masked variation in the underlying data and created uncertainty about testing conditions. *E.g.*, *Hughes* v. *Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965); *McDonald* v. *Mulverhill*, 84 N.J. Super. 382, 202 A.2d 213 (1964).

case, although the tests were performed under specific controlled conditions, *see* 49 C.F.R. § 575.101(d) and (e) (1980),[4] the defendant has not attempted to demonstrate to us any differences existing at the time of the accident that were significant, except perhaps for the skill of the driver. The evidence that was presented at trial had otherwise established a dry road, no abnormal weather conditions, and a relatively new car in "A-1" condition. On this record the matchup of conditions was sufficient to allow the data to be presented to the jury. It is for the defendant to attack the weight to be accorded such evidence by presenting contrary evidence about how the variance between the test and actual conditions—for instance, as when one car stops with skid marks and the other without —might affect the inferences that the plaintiff urges be drawn.

On appeal the defendant alternatively argues that, even if the report were relevant, the trial court properly excluded it because it was hearsay. The Federal Rules of Evidence, however, allow as an exception to the hearsay rule "data compilations, in any form, of public . . . agencies, setting forth . . . (C) . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8).[5] The vehicle safety performance report meets the literal requirements of Rule 803(8)(C). It is a data compilation of a public agency. The

[4] The testing conditions and procedures used to compile the information in the 1970 Report have changed very little in 10 years. They are nearly identical to those listed at 49 C.F.R. Part 575 (1980).

[5] The parties in their briefs have primarily concentrated on the applicability of Rule 803(8)(B), the basis of our initial decision in this case. Upon rehearing we decide that the case is more properly analyzed under Rule 803(8)(C). *Cf.* 4 D. Louisell & C. Mueller, Federal Evidence § 455, at 729 (1980) ("A public record based upon information supplied by outsiders should be viewed as investigative in nature and examined under clause (C).") We therefore express no view regarding the applicability of Rule 803(8)(B) to the facts of this case.

findings it sets forth are purely factual, and resulted from a detailed inquiry that the agency undertook, *see* 49 C.F.R. § 575.101 (1980), pursuant to its statutory authority. *See* 15 U.S.C. § 1401(d). *See also* Report at i ("This publication is a compilation of data provided by the individual auto manufacturers in response to regulations issued by the Department of Transportation's National Highway Safety Bureau.").*

The investigation's "sources of information" and "other circumstances" also demonstrate the resulting report's trustworthiness, thus satisfying the rule's final clause. First we observe that the investigation was completely unrelated to this or other litigation. Its motivation was also otherwise unbiased. The report describes its object by identifying itself as "the second of the Consumer Information Series of publications designed to help you, the consumer, to know more about automobile safety performance." *Id. Cf.* 15 U.S.C. § 1423 (requiring same agency to publish tire grading information "to assist the consumer to make an informed choice"); *Muncie Aviation Corp.* v. *Party Doll Fleet, Inc.*, 519 F.2d 1178, 1182 (5th Cir. 1975) (trustworthiness assured because publishing agency's "only conceivable interest was in insuring safety").

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* We observe that the regulations require manufacturers to provide data to the agency regarding vehicles "manufactured on or after January 1, 1970." 49 C.F.R. § 575.101(b). The agency's investigation of auto safety performance thus is on-going rather than one-time. We do not understand this factor to detract from the status of the agency's efforts as an "investigation."

We also note that this agency's determination of existing vehicles' stopping distances does not present issues arising from a proceeding that "is clearly rule-making—directed in focus to regulation of future conduct, with any fact-finding at most incidental and used primarily for predictive purposes". *United States* v. *American Telephone & Telegraph Co.*, 498 F. Supp. 353, 360 (D.D.C. 1980). *Compare Melville* v. *American Home Assurance Co.*, 443 F. Supp. 1064, 1112 n. 71 (E.D. Pa. 1977) ("An investigation [under Rule 803(8)(C)] is not by its own terms limited to investigation of past events . . . and the wording of the rule gives no indication that the term might be so limited."), *aff'd in relevant part*, 584 F.2d 1306, 1315-16 (3d Cir. 1978).

Next we note that the government agency has by rule established detailed standards by which the private parties are to collect the required data. Published rules direct that braking tests be conducted with a specified poundage on the brake pedal, with the car's fuel tank between 90-100 percent full, and with all vehicle openings in closed position. The ambient temperature must be between 32-100° F. and the wind velocity zero. The test auto may not skid and must remain within a 12 foot lane. Its tire pressure and other relevant component adjustments must comply with the manfacturer's published recommendations. The test road must have a grade of zero percent and the road surface "a skid number of 81, as measured in accordance with . . . (ASTM) Method E-274-70 (as revised July, 1974) at 40 mph, omitting the water delivery specified in paragraphs 7.1 and 7.2 of that method." 49 C.F.R. § 575.101(d)(7) (1980). The regulations also specify testing procedures, including preparatory burnishing,[7] allowable brake temperatures, and measuring methodology. *Id.* at § 575.101(e).

The government agency requires an extremely strict statistical standard in addition to these detailed testing standards; "[e]ach passenger car in the group to which the information applies shall be capable of performing *at least* as well as the infcrmation indicates. . . ." *Id.* at § 575.101(c) (emphasis added). This conservative standard suggests that the average car will have better performance characteristics

[7] An example of the precision required is the set of criteria governing brake burnishing:

> "*Passenger Cars.* Burnish brakes once prior to first stopping distance test by conducting 200 stops from 40 m.p.h. (or maximum sustained vehicle speed if the vehicle is incapable of reaching 40 m.p.h.) at a deceleration rate of 12 f.p.s.p.s. in normal driving gear, with a cooling interval between stops, accomplished by driving at 40 m.p.h. for a sufficient distance to reduce brake temperature to 250° F., or for 1 mile, whichever occurs first. Readjust brakes according to manufacturer's recommendations after burnishing." 49 C.F.R. § 575.101(e)(i) (1980).

than the reported information, if there is any variation at all (as is likely) between the performance of individual autos of a given model.

Finally, the supplying manufacturers have a significant incentive to comply with these detailed data reporting requirements. Their failure to do so violates the law, 15 U.S.C. § 1397(a)(1)(E), and renders them liable for civil penalties. *Id.* at § 1398(a).

Against these factors, defendant's unsubstantiated suggestion that manufacturers may overstate the performance of their products to induce sales is relevant but insufficient to discharge the burden of showing untrustworthiness that rests on a party opposing the introduction of purported hearsay. *See, e.g., Baker* v. *Elcona Homes Corp.*, 588 F.2d 551, 588 (6th Cir. 1978).

The indicia of reliability marking this investigation's methodology also allows us to distinguish less reliable reports that have been excluded in other cases. For example, the Consumer Product Safety Commission accident reports we excluded in *McKinnon* v. *Skil Corporation*, 638 F.2d 270, 278-79 (1st Cir. 1981) and the National Transportation Safety Board accident reports excluded in *John McShain, Inc.* v. *Cessna Aircraft Company*, 563 F.2d 632, 635-36 (3d Cir. 1977) involve accident reports in which the attendant danger of misrepresentation, found in subjective commentary recorded by investigators from interviewees who witness particular acts in disputes, was never overcome. Here by contrast the performance data report contains the results of objective technical analysis performed under controlled conditions.

The defendant argues that Rule 803(8)'s exemption here cannot apply since the information in this data compilation was reported by public officials who personally neither produced the figures not verified their accuracy. He refers us to the Advisory Committee's Notes to Rule 803 that state that Rule 803 does not "dispense[] with the requirement of firsthand knowledge."

We agree that the reporting agency must have firsthand knowledge *of the investigation* by which it accumulates the published factual findings that Rule 803(8)(C) contemplates, since it is the quality of the investigation that determines the caliber of the results. The agency in this case did have such firsthand knowledge; it initiated the inquiry and specified in detail the information sought, the methodology to be used in developing the information, and the statistical standards to which the manufacturers were to adhere. It then determined that the information was sufficiently reliable to publish for the buying public to rely upon when comparing car safety performances. Our judgment is that these factors, combined with the statutory sanctions compelling the manufacturers' accurate responses, ensured sufficient trustworthiness to allow the report to be admitted without further verification efforts by the agency. *Cf. United States* v. *American Telephone & Telegraph Co.*, 498 F. Supp. 353, 364 (D.C. Cir. 1980) (author of report not necessarily required to have firsthand knowledge of facts on which findings are based); 4 D. Louisell & C. Mueller, Federal Evidence § 455, at 734-35 (1980) ("A great advantage of clause C [of Rule 803(8)] is that it embraces records based upon statements or testimony by outsiders to government, so there is no need to show that the source was an official with personal knowledge.") (footnotes omitted); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(8)[03], at 802-803-04 (1979) (government report may be admissible under Rule 803(3)(C) despite lack of official firsthand knowledge of substance if the report is found reliable). The court therefore erred in excluding the report.

We further conclude that the trial court's exclusion of the performance report was more than harmless error. Fed. R. Evid. 103(a); Fed. R. Civ. Proc. 61; 28 U.S.C. § 2111. This case turned in great measure on the critical element of speed. In making this factual determination the jury essentially had before it only the conflicting versions of the two drivers and

the defendant's expert witness who testified to the effect that plaintiff's car was traveling at the faster speed at the time of the collision, and that the skid marks on the road were not made by defendant's car. There was no other evidence presented at trial that could serve the same purpose of establishing a relationship between the skid marks and probable speed. *See de Mars* v. *The Equitable Life Assurance Society*, 610 F.2d 55, 61-62 (1st Cir. 1979) (harmless error when the excluded evidence is cumulative, repetitious, or ambiguous); *see also Garbincius* v. *Boston Edison Company*, 621 F.2d 1711, 1175 (1st Cir. 1980).

On this close question of negligence it is obvious that plaintiffs' case was made considerably weaker by the error. Because we cannot say with reasonable assurance that the jury, had it been given the opportunity to consider the data, would still have found in favor of the defendant we find no alternative but to remand for a new trial.

In light of our disposition of this evidentiary issue it is unnecessary to consider the other contentions raised on appeal. Even were they to resurface upon retrial they would have to be handled in the context of the particular circumstances before the court at that time. For purpose of guidance we do, however, mention that the question of whether an expert witness is necessary or who would qualify as one is, in a diversity case, controlled by the Federal Rules of Evidence. *Garbincius* v. *Boston Edison Company*, 621 F.2d at 1174.[8]

The case is remanded for a new trial.

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[8] The plaintiffs' prayer for relief requested that this case be remanded and assigned to a different trial judge. They, however, give no specific reason to substantiate this particular request. 28 U.S.C. §§ 114, 455. Because the law of this circuit does not require a different trial judge upon a new trial remanded in a jury case, *O'Shea* v. *United States*, 491 F.2d 774, 778-780 (1st Cir. 1974), no further discussion is required on our part.

CAMPBELL, *Circuit Judge* (Dissenting). I agree with the court that under Rule 803(8) the performance data would not be excludable on hearsay grounds. However, I believe the court fails to give adequate attention to the fact that the trial judge excluded the data not on hearsay grounds but for lack of relevance, *and* that appellant never correctly stated the purpose for which the evidence was being offered. Before a party may claim error on appeal in the exclusion of evidence, he must have told the court not only what he intended to prove but *for what purpose*. McCormack, Evidence § 51, at 110-11 (2d ed. 1972), and cases at n.12, and 1978 Supp. at 16, n.12; *see also* Weinstein's Evidence § 103[03], at 103-27, and cases at n.3; I Wigmore, Evidence § 17, at 319-20 and 1980 Supp., cases at p. 97-98; Fed. R. Evid. 103(a)(2); Fed. R. Civ. P. 46. This rule serves important ends. Backlogged courts should not be required to repeat trials (especially civil trials) because the trial judge has excluded evidence for lack of a clear understanding of the proponent's purpose in offering it. Here, plaintiffs' counsel never explained, as he could easily have done, that his purpose was not to show stopping distance at 60 m.p.h. as such, but rather to give rise to the inference, based on a disputed skid mark, that the car was speeding. It seems clear from the judge's remarks that she did not understand that the evidence was being offered for the latter purpose. The document was thereupon excluded for lack of relevance (the hearsay issue was never reached). All this occurred at the end of a week long trial, in a context where the judge could reasonably have felt that matters were being unduly prolonged.

This court skirts the issue in footnote 1. It says that "read in retrospect," the colloquy between court and counsel "reveals that appellant was referring, none too succinctly, to use of the report as an indirect means of calculating the Mercedes' speed prior to the braking." For this reason, "we cannot say . . . that the point as to relevance was not sufficiently made." The rule, however, is not served by looking at the record retrospectively.

The reason a party must communicate the purpose for offering evidence is to put the trial judge on notice while there is still time to save the situation. A trial judge is only human; he may not have perfect recall of earlier testimony; it is counsel's duty, not the court's, to articulate the purpose for which evidence is being offered. Nowhere in this record did counsel say something like, "Judge, I am offering this because we earlier had evidence of 160 foot skid marks and this exhibit will show that if it took the car 160 feet to stop, it must have been going faster than 60 m.p.h." Had this been stated, a different ruling might have been rendered.

To be sure, this court may not mean that counsel here actually *stated* the purpose for the evidence, but only that the purpose was so obvious that counsel was excused from stating it. *See* McCormack, Evidence § 51, at 111. Defendant's speed was already in issue, and the judge arguably should have realized how the performance data report, taken with the other evidence, would relate to the question of speed. But I do not think the indirect relationship between speed and skid marks was so obvious that counsel was excused from stating it. It was clear from the judge's comments that she was laboring under the misimpression that the evidence was being offered merely to show when the brakes had been applied. If the point was that obvious, one would have expected the judge to perceive it; the whole object of the rule is to require counsel to articulate the purpose when the judge is likely otherwise to misunderstand. At the end of the colloquy, counsel stated his intention to prove that the Mercedes going 60 m.p.h. could stop in 160 feet; but that was to state matters backwards. He never once stated the data was offered for the purpose of showing that the 160 foot skid marks meant the Mercedes was going faster than 60.

If I saw evidence of injustice, I might be more tempted to stretch the rule, but I see no such evidence here. Plaintiffs presented their own driver, who testified that the defendant

was going 70 m.p.h. or more, as well as the state trooper who testified to his opinion, based on the skid marks, that defendant was going faster than 50—so the excluded evidence would not have established a new point that was not otherwise made. To be sure, the performance data might have corroborated these witnesses, if the jury believed the skid marks came from the Mercedes, which was put in doubt by one of the plaintiffs' own witnesses as well as by defendant's expert. Even so, the test data was refuttable by arguments that it applied only to new, mechanically perfect cars driven by professional drivers who did not lock the wheels and skid. (The tests were expressly said to have been conducted without locked wheels; thus for all we know the stopping distances were quite different from those of a skidding car.) If it could conceivably have tipped the scales in a close case, this case does not seem to have been close—the jury was out for only an hour. I think that plaintiffs had their day in court, before a jury and a judge who was fair. I do not think plaintiffs should receive a second trial.

United States Court of Appeals
for the First Circuit

No. 79-1647

LARRY W. ROBBINS, ET AL.,
PLAINTIFFS-APPELLANTS,
v.
ROBERT W. WHELAN,
DEFENDANT-APPELLEE.

MEMORANDUM AND ORDER
Entered July 7, 1981

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

When our initial opinion issued in this case costs on appeal were taxed in the usual manner, i.e., in favor of plaintiffs-appellants as the party who through our ruling had secured a remand for a new trial. Upon objection by appellee-defendant to the imposition and the amount of costs itemized by plaintiffs our taxation of costs was vacated pending reexamination of the appeal. Having reinstated our original opinion with modification we proceed to rule on the propriety on the awarding of costs.

Although the normal practice is to award costs to the prevailing party on appeal, it is clear that Fed. R. App. P. 39(a)

"[p]ermits the court to order 'otherwise', thus confirming the power of the court in its sound discretion to deny costs to the successful party." 9 J. Moore's Federal Practice ¶ 239.02[1] at 39-6 n.3 (2ed. 1980). This would appear to be especially so where the prevailing party has succeeded only in vacating the judgment below or in securing a partial ruling in its favor. Because the "[t]axation of costs works as a penalty, which should not be imposed unless the loser can fairly be expected to have known at the outset that his position lacked substance", *see Rural Housing Alliance* v. *United States Department of Agriculture*, 511 F.2d 1347, 1349 (D.C. Cir. 1974) (Bazelon, C.J., concurring), we see this as a proper case in which to depart from the normal practice and allow our discretion to intervene. As our two opinions confirm, the central issue on appeal was susceptible to differing interpretations. While this by itself would generally be insufficient to depart from the normal rule — indeed most appeals would fall into this category — we are moved in this case by the fact that in the record on appeal, that part constituting the bulk of what is itemized by appellant as the basis of costs, did so little to help this court reach its decision. Without leaning too heavily on hindsight, and realizing that appellee must also share the blame in this respect, we simply do not see why so voluminous an appendix was necessary. We also cannot help but note that perhaps the necessity of this appeal, at least on this issue, could have been obviated by more diligent preparation on plaintiffs' part which would have begun with citation to the proper Federal Rules of Evidence and providing a more definite offer of proof to the district court. In sum, we are left with the impression that an unclear area of evidentiary law was made less clear by these shortcomings. *Cf. Wiseman* v. *Reposa*, 463 F.2d 226, 228 (1st Cir. 1972) (where party's palpably invalid objections have caused an appeal, costs would be taxed against that party).

Each party shall bear their own costs on appeal; however, the docket fee required to file the appeal shall be taxed in favor of appellants.

By the Court,

DANA H. GALLUP,

Clerk

By: /s/ Francis P. Seigliano
Chief Deputy Clerk.

United States District Court
for the District of Massachusetts

CIVIL ACTION FILE NO. 73-2889-Z

LARRY W. ROBBINS, ET AL.,

vs.

JUDGMENT

ROBERT R. WHELAN

This action came on for trial before the Court and a jury, Honorable Rya W. Zobel, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, on special questions,

It is Ordered and Adjudged

Judgment is entered for the defendant, and the plaintiffs' complaint is dismissed.

Dated at Boston, Mass. this 5th day of November, 1979.

/s/ Nina Singer
Deputy Clerk of Court

OFFICE OF THE CLERK

United States Court of Appeals

for the First Circuit

DANA H. GALLUP
CLERK

1602 JOHN W. MCCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MASS. 02109
(617) 223-2888

August 5, 1980

To Counsel:

Re: *79-1647 Larry W. Robbins, et al. v. Robert R. Whelan*

Dear Sirs:

In accordance with Rules 34 of the Federal Rules of Appellate Procedure, as amended effective August 1, 1979, this is to advise you that a panel of three judges, after examination of the briefs and record are unanimously of the opinion that oral argument is not needed in this case. Consequently, under F.R.A.P. Rule 34(a) (3), this case will be taken on submission on the briefs without oral argument at the September, 1980, session.

Sincerely yours,

/s/ Dana H. Gallup
Clerk.

DHG:mn

cc: Robert W. McDonald, Esq., 22 MacArthur Road, Bourne, MA 02532
Thomas D. Burns, Esq., Burns & Levinson, 45 School Street, Boston, MA 02108

United States Court of Appeals
For the First Circuit

No. 79-1647.

LARRY W. ROBBINS, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

ROBERT W. WHELAN,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. RYA W. ZOBEL, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Robert W. MacDonald on brief for appellants.
Thomas D. Burns, James F. Kavanaugh, Jr., and *Burns & Levinson* on brief for appellee.

December 30, 1980

COFFIN, *Chief Judge*. The present appeal stems from an automobile accident involving a car driven by the defendant-appellee, Robert Whelan, and a second car in which the two plaintiffs-appellants, Larry Robbins and Gary Baird, were passengers. The driver of the second car, Curtis Frye, is not a party to this suit. As is typical of automobile accident cases the parties differ sharply on the actual specifics of how the accident occurred. In general the accident took place as the Whelan car was traveling east on Route 6, a four lane undivided highway near Bourne, Massachusetts, and the Frye car was exiting a rest area and coming out on to that same highway. According to the version advanced by the plaintiffs the Whelan car was first noticed some 700 feet away at the time Frye first approached the highway. Before entering the highway Frye looked in both directions. Upon entering he again looked in the direction of the Whelan car, and this time

noticed that it was only 300 feet away and approaching at a speed of about 70 miles per hour. At this point Frye attempted to reenter the rest area but, as the resulting collision attests, was unsuccessful. The defendant's version claims that he was traveling at about 40 to 48 miles per hour when the Frye car was first noticed some 750-900 feet away advancing in the rest area in the opposite direction. The defendant claims he maintained his speed up to a point where the Frye car entered the highway in a "sudden swerve" which left little time for any reaction. After a bifurcated trial the jury decided the issue of liability in favor of the defendant.

Appellants' first claim of error is that the trial court should have admitted into evidence a copy of a government report entitled "Performance Data for New 1971 Passenger Cars and Motorcycles." This report consists of statistical data provided by automobile manufacturers and compiled in tables by the Department of Transportation. The report contains information on the minimum stopping distances, acceleration and passing ability, and the tire reserve load of all automobiles manufactured in a certain year. Specifically, the plaintiffs sought to introduce into evidence that part of these tables which stated that the particular type of automobile driven by the defendant had, when traveling at a speed of 60 miles per hour, a minimum stopping distance of 160 feet with a light load and 169 feet with a heavy load. The defendant objected to this document on the grounds that it consisted of inadmissible hearsay and that it was irrelevant to the specific factual issues to be resolved.

Upon first glance it would seem that this statistical data possessed all the earmarks of hearsay; *i.e.*, it represented extrajudicial unsworn proof where the preparer of the evidence was unavailable for cross-examination. 5 Wigmore, Evidence, § 1362 (Chadbourn rev. 1974). Other courts have deemed it proper to exclude this type of evidence for this very reason. *E.g.*, *Roddy* v. *Chicago & Northwestern Railroad*, 48 Ill. App. 3rd 548, 363 NE.2d 65, 68 (1977); *Hughes* v. *Vestal*, 264

N.C. 500, 142 S.E.2d 361, 365 (1965); *Thedorf* v. *Lipsey*, 237 F.2d 190, 192 (7th Cir. 1956). However, the Federal Rules of Evidence allow as an exception to the hearsay rule: "Records, reports, statements, or data compilations, in any form, of public officers or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report. . . ." Rule 803(8). Insofar as the report which contains the statistical data in question was compiled under statutory mandate of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431, *see esp.* § 1401(d), 49 C.F.R. Part 575, Subpart B, it possessed sufficient trustworthiness to allow it to qualify as an exception to the hearsay prohibition of Rule 802, *see* 4 Weinstein's Evidence ¶ 803(8)[02]. Moreover, as a correctly certified government document it would be self-authenticating under F. R. Evid. 902(4). Therefore, the claim that this report constitutes hearsay is, at least under the Federal Rules of Evidence, unfounded.

We are also convinced that this report and the statistical data it contained was relevant. At that point in the trial when the data was offered into evidence the plaintiffs had presented the testimony of a Massachusetts State Police Trooper who testified that he had observed 160 feet of skid marks which he believed were made by defendant's car. He further testified that his observations led him to believe that the defendant's car had been traveling in excess of 50 miles per hour. Frye had testified as to his version of the accident. Depending upon the extent to which the jury accepted the testimony of Frye and the policeman there was enough for it to conclude that the defendant could not stop his automobile within 160 feet after applying his brakes. Had the proffered data been accepted the jury could have further concluded that the defendant at the time he applied his brakes, was traveling close to, or in excess of, 60 miles per hour.

The district court, in part, rejected the report because it considered the negligence question to hinge on a slightly different issue. In rejecting the evidence it stated:

> Nobody says that the vehicle was unable to stop. It is a question of when he put on his brakes, whether it was reasonable for him to put on the brakes at that particular point; that's the issue in the case. Or one of the issues in this case. Not whether this kind of car would stop at 160 or 190 feet. There's no evidence that he started to put on his brakes sooner.

But even when examined from this viewpoint the element of speed remains critical. Whether the timing and the application of the brakes was reasonable depends in great measure on the speed of the vehicle. *See* M.G.L. ch. 90, § 17 (speed limits). If the defendant did not or could not react in time one definite possible explanation was excessive speed. Therefore, even if the district court was correct in its formulation of the factual issue, insofar as it disregarded the significance of the question of speed, this formulation was incomplete.[1] In sum, the plaintiffs presented evidence from which it could have been found that defendant's car did not make a normal stop within 160 feet. The excluded data could build on this and support the conclusion that the stop must have been initiated at a speed close to, or in excess of, 60 miles per hour. Clearly then, because the data had a "tendency to make the existence of [a] fact that [was] of consequence to the determination of the action more probable or less probable than it would be without the evidence" it was relevant. F. R. Evid. 401.

This is not to say we have overlooked the defendant's argument that dissimilarities between those conditions existing at the time of the accident and those existing at the time the tests were performed affected relevancy. We do note that, besides

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[1] In fairness we must say that the district court's failure to grasp the full impact of the proposed data is due in no small part to the manner in which the plaintiffs presented it. Plaintiffs' offer of proof should have been more direct and specific as to what the statistics revealed and what they could prove. On the other hand, the use of stopping distance-speed relationships in automobile personal injury suits is not uncommon.

hearsay, those courts that have excluded this type of evidence have done so principally on this ground. *E.g. Guidry* v. *Grain Dealers Mutual Insurance Co.*, 193 So.2d 873 (La. App. 1967); *McDonald* v. *Mulverhill*, 84 N.J. Super. 382, 202 A.2d 213 (1964); *see also Hughes* v. *Vestal*, *supra*. While not entirely in accord with the reasoning of these cases we agree that marked differences between conditions may detract considerably from this type of evidence so as to render it of little or no value. *See e.g. Johnson* v. *Koski*, 234 N.W.2d 184 (Mich. 1975) (icy conditions of road at time of accident made stopping chart useless). For the most part, however, because "perfect identity between experimental or actual conditions is neither attainable nor required . . . [d]issimilarities affect the weight of the evidence, not admissibility." *Ramseyer* v. *General Motors Corporation*, 417 F.2d 859, 864 (8th Cir. 1969) (citations omitted). In the final analysis each case must be judged under its own particular facts taking into account the specific purpose for which this type of evidence is submitted. *Cf. Sherry* v. *Asing*, 531 P.2d 648, 663 (Ha. 1975); *Winekoff* v. *Popisil*, 384 Mich. 260, 181 N.W.2d 897 (1970).[2] In this particular case, although the tests were performed under specific controlled conditions, *see* 49 C.F.R. § 575.101(d) and (e),[3] the defendant has not attempted to demonstrate to us any dif-

[2] In *Winekoff* v. *Popisil*, 384 Mich. 260, 181 N.W.2d 897, 898 (1970) the Supreme Court of Michigan observed: "Since *Noyce* [*Noyce* v. *Ross*, 360 Mich. 668, 104 N.W.2d 736 (1960)] our steady experience with automobile negligence cases suggests that these widely published and pretty well understood stopping distances have some value as evidence, provided the proof preceding their admission discloses a fair and relevant reason for submitting them to the jury as an aid to the solution of the ever-present issues of due care and causation."

[3] In the particular report before us the fact that the conditions under which the tests are performed may be easily verified helps distinguish this case from those where the conditions, methods and procedure for compiling the stopping charts were unavailable. *Cf. Hughes* v. *Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965); *McDonald* v. *Mulverhill*, 84 N.J. Super. 382, 202 A.2d 213 (1964).

ferences existing at the time of the accident which were significant, except perhaps for the skill of the driver. The evidence which was presented at trial had otherwise established a dry road, no abnormal weather conditions, and a relatively new car in "A-1" condition. On this record the match of conditions was sufficient to allow the data to be presented to the jury. It is for the defendant to attack the weight to be accorded such evidence by presenting counter-evidence about how the variance between the test and actual conditions—for instance, as when one car stops with skid marks and the other without—might affect the inferences that the plaintiff urges be drawn.

Bearing in mind that a determination as to the "relevancy of evidence is within the sound discretion of the trial judge, whose ruling will not be disturbed unless an abuse is shown," *United States* v. *Coast of Maine Lobster Comp. Inc.*, 557 F.2d 905, 908 (1st Cir. 1977), *cert. denied*, 434 U.S. 862 (1977), and having concluded that the data which was sought to be presented in evidence was not hearsay and was relevant, we now further conclude that its exclusion was more than "harmless error." F. R. Evid. 103(a); F. R. Civ. P. 61; 28 U.S.C. § 2111. As we have pointed out this case turned in great measure on the critical element of speed. In making this factual determination the jury essentially had before it only the conflicting versions of the two drivers and the defendant's expert witness who testified to the effect that plaintiffs' car was traveling at the faster speed at the time of the collision, and that the skid marks on the road were not made by defendant's car. There was no other evidence presented at trial which could serve the same purpose of establishing a relationship between the skid marks and probable speed. *See de Mars* v. *The Equitable Life Assurance Society*, 610 F.2d 55, 61-62 (1st Cir. 1979) (it is harmless error when the excluded evidence is cumulative, repetitious or ambiguous); *see also Garbincius* v. *Boston Edison Company*, 621 F.2d 1171, 1175 (1st Cir.

1980). On this close question of negligence it is obvious that plaintiffs' case was made considerably weaker by the error. Because we cannot say with reasonable assurance that the jury, had it been given the opportunity to consider the data, would still have found in favor of the defendant we find no alternative but to remand for a new trial.

In light of our disposition of this evidentiary issue it is unnecessary to consider the other contentions raised on appeal. Even were they to resurface upon retrial they would have to be handled in the context of the particular circumstances before the court at that time. For purpose of guidance we do, however, mention that the question of whether an expert witness is necessary or who would qualify as one is, in a diversity case, controlled by the Federal Rules of Evidence. *Garbincius* v. *Boston Edison Company, supra,* 621 F.2d at 1174.

This case is remanded for a new trial.[4]

[4] The plaintiffs' prayer for relief requested that this case be remanded and assigned to a different trial judge. They, however, give no specific reason to substantiate this particular request. 28 U.S.C. §§ 114, 455. Because the law of this circuit does not require a different trial judge upon a new trial remand in a jury case, *O'Shea* v. *United States,* 491 F.2d 774, 778-780 (1st Cir. 1974), no further discussion is required on our part.

United States Court of Appeals
for the First Circuit

No. 79-1647.

LARRY W. ROBBINS, ET AL.,
PLAINTIFFS-APPELLANTS,
v.
ROBERT R. WHELAN,
DEFENDANT-APPELLEE.

JUDGMENT

Entered: December 30, 1980

This cause was submitted on briefs on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The judgment of the District Court is vacated and the verdict of the jury is set aside, and the case is remanded for a new trial in accordance with the opinion filed this day.

Costs to appellants.

By the Court:

/s/ DANA H. GALLUP
Clerk

United States Court of Appeals
for the First Circuit

No. 79-1647.

LARRY W. ROBBINS, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

ROBERT R. WHELAN,
DEFENDANT-APPELLEE.

MEMORANDUM AND ORDER

Entered: January 19, 1981

ON PETITION FOR REHEARING

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

The petition for rehearing filed by the defendant-appellee is granted and we withdraw our opinion and judgment of December 30, 1980. The parties are granted a period of 25 days following the date of issuance of this order to file supplemental briefs addressing the issue of the admissibility of the govern-

ment report in question under Rule 803(8), Fed. Rules of Evidence, or any other authority. Our order entered relative to costs is also hereby vacated pending disposition of appeal on rehearing.

By the Court:

/s/ DANA H. GALLUP

Clerk.

United States Court of Appeals
for the First Circuit

No. 79-1647.

LARRY W. ROBBINS, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

ROBERT R. WHELAN,
DEFENDANT-APPELLEE.

JUDGMENT
Entered: July 7, 1981

This cause came on to be submitted upon a petition for rehearing on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The verdict of the jury is set aside, the judgment of the District Court is vacated, and the cause is remanded to that Court for a new trial.

By the Court:

DANA H. GALLUP,
Clerk.

By: /s/Francis P. Seigliano
Chief Deputy Clerk.

[5-8] JOSEPH HOURIHAN, *Sworn*
Direct Examination by Mr. MacDonald

Q What is your name?
A Joseph Hourihan.
Q Where do you live?
A 219 West Squantum Street, Quincy, Massachusetts.
Q What is your occupation?
A I'm a Supervisor of Special Services for the Registry of Motor Vehicles of the Commonwealth of Massachusetts.
Q In your capacity in that position, sir, do you investigate accidents?
A I have.
Q And are you familiar with the document that — or the book or pamphlet that I put in front of you, sir?
A I am familiar with the publication.
Q And would you tell us what that — who issues that publication and what it — how it is used in the automotive industries?

MR. BURNS: I object.

THE COURT: I will hear you at the side bar.

(Conference at the bench between Court and counsel as follows:

MR. BURNS: I object, your Honor, first of all, I don't know who Mr. Hourihan is. We never heard his name in connection with this case before in any list of witnesses. I don't know what he's qualified to say what goes on in the automotive industry.

Because he is familiar with the book doesn't necessarily make it or its contents admissible. I'm familiar with the Gutenberg Bible, but that doesn't make it admissible in case because it has nothing to do with the witness.

Simply because there is some agency in Washington that compiles a book of information with respect to various cars

and what they might do or will not do under the circumstances, I don't think that has any relevancy, materiality or admissibility in this case.

MR. MACDONALD: Under 233 79(b) publications which are issued by agencies and relate to information that is available [5-10] to consumers and used in the automotive industry or in any industry or admissible under that statute.

THE COURT: For what purpose?

MR. MACDONALD: For the purpose of the information contained therein relative to the case that's here, the performance standards of motor vehicles and this is what I'm offering this for. The passenger cars and motorcycles, performance date for the year 1971 relating to the stopping capacity of an ability of a 1971 Mercedes 280SE.

THE COURT: Do you have a copy of the statute?

MR. MACDONALD: I can get one.

MR. MARTIN: I think I have a book.

THE COURT: 233 79(b).

I have a little trouble, Mr. MacDonald, seeing how some standard is relevant in this case when we're dealing with a particular automobile that may or may not conform to the standard.

Unless you show me that its [5-11] failure to conform is some form of negligence, I haven't heard anything on that.

MR. MACDONALD: It is offered for the purpose of showing what, under standard tests, conducted by the federal government, what the manufacturers according to their standards, this vehicle was stopped at a distance of 160 feet, traveling within a marked lane 12 feet wide, without leaving tire marks, with a light load in it. And I think that it is important.

THE COURT: There's evidence there that he didn't put on his brake here until —

MR. MACDONALD: Seventy feet away.

THE COURT: You are talking about 160 feet.

MR. MACDONALD: 160.

THE COURT: No. 2 —

MR. MACDONALD: The stopping ability of the vehicle.

THE COURT: That is the relevance [5-12] of that. Nobody says that the vehicle was unable to stop. It is a question of when he put on his brakes, whether it was reasonable for him to put on the brake or unreasonable for him to put on the brake at that particular point; that's the issue in the case. Or one of the issues in the case. Not whether this kind of car would stop at 160 or 190 feet. There's no evidence that he started to put on his brake sooner.

I think I will rule it out simply on the question, I don't see the relevance of the standard car to this particular case and this particular accident, and I'll save your rights.

MR. MACDONALD: May I make an offer of proof?

THE COURT: But the evidence as I have seen it so far is nothing to do with what is in this book and what this book contains and what you tell me it does not add anything to the evidence.

MR. MACDONALD: I offer this exhibit into evidence for the reason that [5-13] it contains performance data for new 1971 passenger cars, Mercedes-Benz 280SE, which is a vehicle that's one of the vehicles involved in this case, and it's offered for the purpose of showing what the stopping ability of a 28SE with a light load or with a heavy load in it. And that the distance traveling within a 12-foot lane that it would stop in 160 feet and with a light load and 169 feet with a heavy load.

MR. BURNS: May it be marked for identification, your Honor.

MR. MARTIN: At what speed?

MR. MACDONALD: I want it marked for identification.

At a speed of 60 miles an hour — yes, at a speed of 60 miles an hour would stop in 160 feet without leaving tire marks.

THE CLERK: Exhibit H for identification.

(Phamphlet marked Plaintiff's Exhibit H for identification.)

. . . end of conference at the bench.)

MR. MACDONALD: Mr. Hourihan, you may step down from the witness stand.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-667

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

ROBERT R. WHELAN,
PETITIONER,

v.

LARRY W. ROBBINS AND GARY M. BAIRD,
RESPONDENTS.

Brief in Opposition to Petition for A Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether a report compiled by the United States Department of Transportation from information supplied to it by private corporations falls within the exception to the hearsay rule prescribed by Federal Rules of Evidence, Rule 803(8).

2. Whether the failure of respondents' counsel to state precisely the purpose for which he offered evidence alleviates error by the trial judge in excluding the evidence for lack of relevance.

Opinions Below.

The opinions below are as stated by the petitioner.

Jurisdiction.

The jurisdiction is as stated by the petitioner.

Federal Rules Involved.

FEDERAL RULES OF EVIDENCE.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

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No. 81-667.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

ROBERT R. WHELAN,
PETITIONER,

v.

LARRY W. ROBBINS AND GARY M. BAIRD,
RESPONDENTS.

Brief in Opposition to Petition for A Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The respondents, Larry W. Robbins and Gary M. Baird, respectfully pray that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on July 7, 1981 be denied.

Statement of the Case.

The petitioner's statement of the case omits that the case was decided by the United States Court of Appeals on the respondents' first claim of error and omits the other issues raised on appeal, but not decided, for the reason as stated: "In light of our disposition of this evidentiary issue it is unnecessary to consider the other contentions raised on appeal" (A. 9a).

The other issues raised on appeal are:

2. Did the trial judge err in denying plaintiffs' motion in opposition to defendant's request for instructions regarding joint enterprise and in charging the jury on joint enterprise?

3. Did the trial judge err in overruling objections to testimony from an expert witness based upon photographs in evidence, being the only witness offered by the defendant, which, if believed by the jury, would be determinative of the facts in issue to be decided by the jury?

4. Did the trial judge err in refusing to allow the plaintiffs to present rebuttal testimony from an expert witness following testimony of the defendant's expert witness?

The petitioner's statement of the case also includes a statement of the facts. The respondents submit the following facts in correcting omissions in the petitioner's statement. At pages 4 and 5 of the petition, that Frye, driver of the car in which the respondents were passengers, was interviewed by Sergeant Embrescia while a patient in the intensive care unit at Tobey Hospital sometime after September 3, 1971, that he "had a bandage on his head around his forehead," was in bed and his "injuries were a lacerated tongue, chin and ear, internal injuries." At the trial Frye testified that he purchased a six pack of beer on the afternoon of the accident, that Michael Baird and he drank it before 3 o'clock and that he had supper at home about 5:30.

At page 6 of the petition, reference is made to the testimony of a Massachusetts State Police Trooper and that he testified "without any means of refreshing his memory." That statement is inaccurate because the Trooper testified about pictures of the accident scene taken shortly after the accident that were admitted in evidence and showed his police cruiser at the scene, tire skid marks on the roadway next to his cruiser along the white lane pavement markings of the highway as well as other marks and debris associated with the accident.

The petitioner's statement also omits that the statistical data was supplied by the manufacturer on prescribed forms in a manner required by the Code of Federal Regulations and that compliance with the same is mandated by liability for civil penalties "not to exceed $400,000 for any related series of violations" (15 U.S.C. § 1398), and, indeed, permission of the Department of Transportation for sale to the public of such a motor car.

Summary of the Argument.

Certiorari should not be granted because no public question is presented in this case and the controversy is between the plaintiff and the defendant, in that a new trial is granted because the trial justice committed error in excluding statistical data on the stopping distance of a 1971 motor vehicle that had been promulgated by the Department of Transportation pursuant to the Federal Code of Regulations and prescribed methods of gathering that data.

The cases cited by the petitioner do not present any diversity of opinion between the various Circuit Courts of Appeal and are distinguished from the case at bar, as indeed the opinion of the First Circuit Court of Appeals so states.

Reasons for Denying the Writ.

I. The Decision Below Does Not Conflict with the Decision of Other Courts of Appeals as to the Proper Interpretation of Rule 803(8) of the Federal Rules of Evidence.

The performance data satisfies "the rule's final clause" (A. 5a) of trustworthiness as stated as an exception to the hearsay rule (A. 4a) "data compilations, in any form, of public . . .

agencies, setting forth . . . (C) . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8). The trustworthiness criteria was stated in the "Notes of Advisory Committee on Proposed Rules" to Rule 803,

> The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.
>
> The present rule proceeds upon the theory that under appropriate circumstances *a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.* The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate . . .
>
> *Exception (8)* . . . further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6) supra. [Records of regular conducted activity] (emphasis added).

Those comments are in keeping with Fed. R. Evid. 102, Purpose and Construction.

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expenses and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Neither the Advisory Committee's Notes nor the congressional reports on Rule 803(8) mention reports prepared by private parties and filed with public offices or agencies pursuant to statutory requirements. The discussion in congress related to criminal actions and safeguarding the constitutional right of confrontation, wherein the differentiation between criminal and civil actions was incorporated in Rule 803(8).

The elements of trustworthiness were present in the performance data by the sanctions and requirements contained in the United States Code and Code of Federal Regulations referred to above.

The decision in *Baker* v. *Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978) noted that "[g]enerally the courts have been liberal in determining admissibility under Rule 803(8)," *id.* 557, and at 558 quoted the last paragraph of the Advisory Committee's Note. "The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence, the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present . . ." The court affirmed a judgment for the defendant truck driver holding that Rule 803(8)(c) authorized the admission of a police report containing findings about the color of a traffic light at the time of an accident. The court then held that where the report had been placed in evidence by the defendant, the burden was on the plaintiff to show that the report was inadmissible because its sources of information or other circumstances indicated a lack of trustworthiness. That burden was not met. Note reference to this case in the decision at bar (A. 7a).

In the case at bar the decision of the Court of Appeals (A. 7a) distinguished "the indicia of reliability marking" the per-

formance data from "less reliable reports that have been excluded in other cases," citing "accident reports in which the attendant danger of misrepresentation, found in subjective commentary recorded by investigators from interviewees who witness particular acts in disputes, was never overcome. Here by contrast the performance data report contains the results of objective technical analysis performed under controlled conditions."

It is germane that the performance data was prepared for purposes independent of litigation. *See, United States* v. *Stone*, 604 F.2d 922 (5th Cir. 1979). The decision of the Court of Appeals also made that observation (A. 5a) "First we observe that the investigation was completely unrelated to this or other litigation. Its motivation was also otherwise unbiased."

The cases cited by the petitioner at pages 10-12 may also be distinguished from the case at bar.

In *United States* v. *Corr*, 543 F.2d 1042 (2d Cir. 1976) the court excluded (at 1050-51) a SEC release dealing with trading in "Judo" stock; " 'It appears that the public float in the stock, the number of shares available for public trading, is approximately 250,000 shares of which approximately 150,000 shares or 60% of such float may be controlled directly or indirectly by one person. It is possible therefore that Mackey's stock may be subject to erratic price movements.' " The defendant Corr claimed the release referred to him and he sought to introduce the same to show a prior determination by the Government that 150,000 of his shares were 'available for public trading' as evidence against the Government's charge that he was a 'control person.' The court noted that the obvious purpose of the announcement was to notify the public that the trading suspension of Judo securities was lifted and that the price may be subject to erratic price movements. The court held that it need not decide whether the

statement purported to be a finding by the SEC that the 150,000 shares were properly in the "float" . . . "the document was hearsay outside of the hearsay exception of Rule 803(8)(c) . . . since the release was not a determination of facts obtained after administrative proceedings. We not only find its relevance minimal but, more important, inadmissible as hearsay." *Id.* at 1051. Clearly, there was no reliability factor in the data that would have permitted a different result in the First Circuit as alleged by the petitioner.

The Second Circuit in *United States* v. *Pent-R-Books, Inc.*, 538 F.2d 519 (2d Cir. 1976) was "persuaded by the reasonings of the Ninth Circuit in *United States* v. *Lange*, [466 F.2d 1021 (9th Cir. 1972)] at 1024-1025 and elect to follow that reasoning" in holding that entries by third parties on Postal Service Forms in the administrative record were admissible in evidence.

In *United States* v. *Lange*, *supra*, 466 F.2d at 1024, the court cited *LaPorte* v. *United States*, 300 F.2d 878 (9th Cir. 1962) "it is relevant to examine the 'content and method of preparation of the document sought to be introduced.' " The *LaPorte* court found a Selective Service form that had been completed by personnel of the city department of charities admissible as having been completed by 'ad hoc' officials of the Selective Service System. *Id.* at 881, citing 5 Wigmore, Evidence § 1633, 1633(a) (3d ed. 1940).

The *Lange* court noted that the statements were in Post Office printed forms asserting that the private citizens received advertising that they found to be objectionable under 39 U.S.C. § 4009. "These factors tend to insure that the person complaining did in fact receive the material. Moreover, these factors distinguish our case from other precedents indicating judicial reticence to allow third party statements into evidence simply because they were made to a public employee . . . These are parties who ask that their gov-

ernment perform what it is required by law to do. This tends to insure that the method of preparation of these records is inherently reliable." *Id.*, at 1025.

United States v. *478.34 Acres of Land, Tract No. 400*, 578 F.2d 156 (6th Cir. 1978), cited by the petitioner at page 11, is distinguishable in that statistical survey data was held to be *not relevant* to prove the agricultural value of the Cook farm because no effort was made to show that the unidentified properties covered by the survey were comparable (emphasis added). The survey data contained selling prices of land obtained by a government employee from recorded deeds. The case was decided on relevancy rather than a report of a governmental agency.

Smith v. *Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), cited by the petitioner at page 11, admitted the Coast Guard's report of findings of fact entitled "Characteristics of Benzene Under Shipboard Conditions" but excluded evaluative conclusions and opinions, which were really *subjective*, as well as a quote from the Encyclopedia of Chemical Technology, which should have been offered under the hearsay exception for learned treatises. That decision is distinguished from the case at bar which found the performance data to be "*objective technical analysis performed under controlled conditions*" (emphasis added) (A. 7a).

John McShain, Inc. v. *Cessna Aircraft Co.*, 563 F.2d 632 (3d Cir. 1977) cited by the petitioner at page 12 was cited in the Court of Appeals decision (A. 7a) and distinguished from the case at bar in noting that "accident reports in which the attendant danger of misrepresentation, found in subjective commentary recorded by investigators from interviewees who witness particular acts in dispute, was never overcome" (A. 7a).

The cases cited by the petitioner involved reports arising from some dispute, controversy or accident where the pri-

mary use was in resolving such dispute, controversy or accident and are thereby distinguished from the case at bar where the report of the performance data was not for such purposes but was to inform the consumer of performance data of a new motor vehicle prior to its purchase under specified controlled conditions subject to sanctions and penalties imposed by federal statutes and regulations.

The Appeals Court further found (A. 8a) that the reporting agency did have firsthand knowledge of the investigation by which it accumulated the published factual findings that Rule 803(8)(c) contemplates: "it initiated the inquiry and specified in detail the information sought, the methodology to be used in developing the information, and the statistical standards to which the manufacturers were to adhere. It then determined that the information was sufficiently reliable to publish for the buying public to rely upon when comparing car safety performance . . ."

The cases cited by the petitioner are distinguishable from the case at bar and there is no conflict with the rulings of the Court of Appeals and holdings in other circuits. *See, Marks* v. *Prattco Inc.*, 607 F.2d 1153, 1156 (5th Cir. 1979) in which information sheets filled out by a corporation in response to a request from the Equal Employment Opportunity Commission, which were forwarded to the commission and retained in its files, were admitted as public records, which was also cited in 4 Weinstein's Evidence, 1980 Supp. 803-202 "Copies of information sheets filled out by employer in response to EEOC request which were part of EEOC investigative file with regard to alleged discriminatory hearings were public records which were properly admitted since there was no showing of lack of trustworthiness," as in *Garcia* v. *Gloor*, 609 F.2d 156, 165 (5th Cir. 1980) that investigated report and determination of EEOC should have been admitted and transcript of unemployment claim proceeding would have been admitted had it been properly authenticated.

The guidelines enunciated by the various Courts of Appeals are sufficient to guide the trial courts in the administration of justice.

The admissibility of the performance data remains an extreme situation and a sufficiently unlikely occurrence that its settlement by the United States Supreme Court is of relative unimportance to the public as distinguished from the parties. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923) and there is no real and embarassing conflict of opinion and authority between the circuit courts of appeals, *id.* at 393. Indeed, should this Court grant certiorari and reverse the Court of Appeals, the case should be remanded to the Court of Appeals for a decision on the three other grounds of error raised on appeal that were not decided by the Court of Appeals. The sound administration of justice would dictate that certiorari be denied and the case be remanded to the United States District Court along the guidelines provided by the decision of the Court of Appeals.

II. The Decision Below Does Not Raise a Significant Issue Concerning the Efficient Administration of Justice in the Trial Courts.

The Court of Appeals has granted a new trial to the respondents on the grounds that testimony of the performance data of the same model car of the petitioner was objected to by counsel for the petitioner on the grounds of relevancy or materiality (A. 30a). The trial judge took the slant that the data was not relevant "in dealing with a particular automobile that may or may not conform to the standard" (A. 30a). Finally, at the end of his offer of proof, counsel for the respondents was permitted to state that "at a speed of 60 miles an hour (the auto) would stop in 160 feet without leaving tire marks" (A. 31a). At that point, the trial judge could

have reviewed her ruling and admitted the data into evidence as relevant, but did not do so. There had been testimony by the driver, Frye, that the petitioner's speed was about 70 miles per hour and from the State Trooper that from the length of the skid marks and the position of the petitioner's 1971 Mercedes sedan on the opposite side of the highway at the curb, completely turned around, after measuring the skid marks to up to the point of contact, that the petitioner's speed was in excess of 50 miles per hour, which exceeded the speed limit in that area. Commonly, testimony of stopping distances is submitted to ascertain the speed of a vehicle prior to an accident. See the Court of Appeals decision note 2 (A. 3a).

The Court of Appeals had noted in note 1 (A. 2a, 3a) that the trial court considered "only the relevance of the report as bearing on inadequate brakes, a factor that was not in issue. Nevertheless, we cannot say that the record is so confused that the point of relevance was not sufficiently made." There had been testimony that the petitioner's car was relatively new, in "A-1" condition (A. 4a) as well as to length of the skid marks of 160 feet (A. 3a).

The ruling of the trial court on the petitioner's objection to the testimony on the performance data was based upon the petitioner's counsel's suggestion of no relevance or materiality. The respondents should not be made to suffer over an erroneous ground of objection by petitioner's counsel as well as an erroneous ruling by the trial court on such objection.

The administration of justice in this case would best be served by denial of the petition for writ of certiorari and a new trial in the United States District Court. If certiorari were granted and the Court of Appeals reversed on the issue of admissibility of the performance data, the case would have to be remanded to the Court of Appeals for a decision on the three other grounds of error raised by the respondents in

their appeal. There is no public issue involved in this aspect of the petition and is only of importance to the parties, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, *supra*, and there is no real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Id.*, at 393.

Conclusion.

For these reasons, a writ of certiorari should *not* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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